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PROGRESS OF THE LAW.

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We print this month the opinion of Judge RITCHIE, of the Superior Court of Baltimore, referred to last month, in which he holds that the purchaser of a section in a Pullman sleeping car for a given trip has the right, on leaving the train before he reaches his destination, to transfer the use of his section to another first-class passenger, for the rest of the trip for which it was sold.

Carriers, Passengers, Pullman Sleeper, Transfer of Ticket

"This suit is brought to recover damages for having been ejected from a certain section in one of the defendant's sleeping cars. So far as it is necessary for me to refer to the facts in the case, they are as follows: On the 30th of September, 1893, Mr. Curlander and his wife, the plaintiffs, left Baltimore upon the Baltimore and Ohio Railroad for Chicago; on the same day some gentleman and his wife, whose names are not known, but whom I will designate as Mr. and Mrs. "X.," boarded the same train at Washington for the same city. All parties were entitled to a first-class passage to Chicago.

"Mr. X. had bought and paid for the use of section number one on the Pullman Sleeper, "Valley Falls," attached to said train, from Washington to Chicago, and held a ticket for the same. The only restriction printed upon this ticket was "Good for this date and car only when accompanied by a first-class railroad ticket." During the day the Pullman con-

ductor took up this ticket and gave Mr. X. in lieu thereof a check for the use of the section in question. This check showed on its face the same trip, that is, from Washington to Chicago, and the only limitation on it touching its use was: 'This check is good for this trip only.' On the evening of the same day, at Pittsburg, Mr. Curlander bought for himself and wife the upper berth of section six in the same car and paid for its use from that point to Chicago. On the next morning, after the car had been arranged for day travel, it was found that the seats which went with the upper berth were those which faced the rear of the car and required the plaintiffs to ride backwards. After riding a short time in this position Mrs. Curlander had a severe attack of nausea; observing her sickness Mrs. X. invited her to a seat in her section, where she rode facing the engine, and was much relieved by her change of position. Mrs. X. then told her that she and her husband would soon leave the car, having determined to get off at Deshler, a station about seven hours distant from Chicago, and said that her husband would give their section to Mr. Curlander so that she would not have to ride backwards. On leaving the train at Deshler, Mr. X. accordingly told Mr. Curlander that he might have his section for the rest of the trip; and transferred to him the check which he held for the same. A little further on, at Defiance, the Pullman conductor, knowing that Mr. and Mrs. X. had left the train, sold the section over again from that point to Chicago to parties who boarded the train at that station. Upon bringing these persons to the section he found it occupied by the plaintiffs. Being requested to vacate and return to their former seats, Mr. Curlander told the conductor that the section had been given to him by Mr. X., and showed him the check which he held therefor, offering to the conductor at the same time the use of his two seats in section six. An altercation ensued, the conductor of the train was called in, and while there is some conflict as to whether the ejection was the act of the defendant or of the train conductor, the plaintiffs were compelled to vacate the section. Soon after returning to her former seat, Mrs. Curlander again suffered from severe nausea

and continued to do so until she reached Chicago. The plaintiffs remained in Chicago without special incident until October 10th, meanwhile, from time to time, visiting the World's Fair, and on that day Mrs. Curlander was taken with an illness peculiar to her then condition. She started for home on the 12th, and, though she had not then entirely recovered, she seems to have suffered no material after-effects from this sickness. This sickness also is included as an element in the claim for damages.

"The sleeping car belonged to defendant, and was attached to this train under contract with the railroad company, the defendant being entitled to all proceeds from the sale of seats or berths.

"The important question at the threshold of this case is as to the right of Mr. X., on leaving the train, to transfer the use of his section to Mr. Curlander for the rest of the trip to Chicago. Neither the able counsel nor the court have been able to find any case in which this question has been passed on, or any text-book in which the author expresses an opinion upon it. It is conceded that the ticket for a section on a sleeping car is transferable by delivery at any time before the holder enters upon the journey for which it is purchased, but it is contended that if he once enters upon his trip and leaves the train before arriving at his destination, he abandons or forfeits his right in such section for the balance of the trip for which it was sold.

"If this be so, the passenger having bought and paid for the use of the section for the whole of the designated trip, the restriction against the transfer must be found either in the express terms of the contract, by implication from its terms, or by construction, from the nature of the contract. There is no express provision against transfer, and the defendant contends that the restriction arises from the nature of the contract, and also by implication from some of its terms.

"In the absence of authority upon the direct question as affected by the nature of the contract, the defendant relies upon a supposed analogy between the contract of carriage by a railroad company and a contract for the use of a section on

a sleeping car, and invokes the rule of construction which is applied to the contract of carriage. It is well settled that the usual contract of carriage from one point to another on the same road is an entire contract, involving a continuous trip, though the ticket be silent in this respect, and that when the passenger has once selected his train and started upon his journey, he has no right to stop over at an intermediate point and then resume his journey upon another train on the same ticket. Such a contract is construed to import a continuous trip by the same train because of the nature of the undertaking. The reasons for such construction are fully stated in *McClure's Case*, 34 Md. 532, and the numerous other authorities cited by defendant. But, assuming the analogy claimed, these cases would not control the question here, because in this case there was no effort made to use this section check on a later or another train, but only on the trip for which it was issued. It may be, as defendant contends, that a continuous trip under a contract of carriage, means a continuous trip by the same person as well as on the same train, though I intimate no opinion on that point, but while there are two cases submitted by defendant, in which the courts say *obiter*, that such is the law, they, and all others, were cases in which the original holder or assignee of a partly used railroad ticket, good only for a continuous trip, attempted to use it on another train. Some of the reasons given why the same holder cannot resume his journey on another train might apply to the case of the use of the ticket by another person on the same train, while others would not.

"But assuming that the railroad contract of carriage means a continuous trip by the same person, and on the same train, is there anything in the nature of the contract for the use of a section on a sleeping car that requires a similar construction? The defendant claims that the contracts are analogous, and should receive a like construction. I do not think so. The two contracts are essentially different in character; they are made with different companies, relate to different subject-matters, and are perfectly distinct in their undertaking. The contract with the railroad company is a contract to carry; the

contract with the Pullman Company has nothing to do with the transportation of the passenger, and has no relation to the contract of the railroad company further than that the Pullman ticket, or check, is not good unless accompanied by a first-class railroad ticket. The contract for the use of a section is described in the text-books and in the regulations of the company as a contract of sale—a sale of a given "space" in a designated car. It is a hiring or a *quasi* lease of the section, and gives to the passenger the right to the use of the same with its comforts and conveniences between the points designated on the ticket. This is the right sold and the right paid for. The Pullman Company has no active service to perform under its contract with the passenger; it has only to permit him, without interference, to have the use of the section it has sold him. So far as it does in fact carry the passenger in one of its cars, that is a matter of contract between it and the railroad company, with which alone the contract of carriage is made. The railroad company will carry him in one of its own coaches; or if he contracts with the Pullman Company for the use of a section, the railroad company provides for his transportation in a Pullman car by its contract with the Pullman Company. The distinct character of the contract made by the passenger with each company is shown in *Ulrich's Case*, 108 N. Y. 80.

"When the passenger has selected his train and has called on the railroad company to perform its contract and carry him to his destination, and the company tenders itself ready to perform, and furnishes the necessary means and accommodations, there is good reason why he should not be permitted to stop off at one or more intermediate stations, and afterwards resume his journey on the same ticket. Under the contract of carriage, the railroad company must furnish accommodations and has active services to perform, and when it has once responded to the demand of the passenger and has partly performed its duty and stands ready to perform the rest, it would be unreasonable to require it to stand ready again and again to respond to the call of the passenger according as he may please to break his journey. Further reasons stated in the

authorities why the railroad contract is construed to mean a continuous trip by the same train are that, the contrary doctrine would impose on the carrier additional duties, the removal of the passenger and his baggage from one train to another, an increased risk of accidents, and a hindrance and delay not contemplated. It is contended that the same reasons, or some of them, prevent the passenger when leaving the train from making a valid transfer of his railroad ticket to some one else for the rest of the trip; and further, that the same considerations require a similar construction of the contract made with the Pullman Company. But from the different nature of the contracts, none of these reasons apply in the case of the sale of a section in a sleeping car, and they do not require that a continuous trip under the Pullman contract should be construed to mean a continuous trip by the same person. The contract being for the use of a given section on a given train, necessarily imports a continuous trip by that train, and the Pullman Company needs no protection against a demand for the use of the same section on the same ticket on a later day; no additional duties are imposed on the Pullman Company by allowing the transfer of his section for the rest of the trip by a passenger who leaves the train; it is not subjected thereby to any additional risks, nor to any hindrance or delay; it handles no baggage, no additional attentions are required, and it makes no difference whether the porter makes up the berth and dusts off the seat for one passenger or another. The company sells the use of its section, with the right to some trifling services from its porter, from one point to another, and is paid in full for the same; it can make no possible difference to it whether the section is occupied by one first-class passenger or another, and whoever may hold it, the company can be called upon to do or furnish nothing that it has not agreed to and been paid for. If the holder leaves the train without transferring his section, it might be inferred that he had abandoned it to the company and it might be resold, but when the company undertakes to sell again what it has already once sold and been paid for, it does so at the risk of trespassing upon the rights of others.

"It is held in *Searle's Case*, 45 Fed. Rep. 330, that the purchaser of a section may share its use with any proper persons whom he invites into it; this is because he has purchased the use of the whole section, and as he can bestow on others the right to use part of it while he is there, I can see no reason why he cannot confer upon them the right to continue the use of it when he leaves the train before the end of the trip for which it has been sold. It is also conceded, as I have said, that the purchaser may transfer his section before he enters upon his journey. I can see no reason why it should become absolutely non-transferable the moment after he starts. I can see no reason why he cannot transfer it immediately after starting, if he chooses to ride in a passenger coach; or why two passengers might not exchange sections; or why, after having gone half of his journey, the holder might not then transfer his section for the balance of his trip, and himself withdraw into a passenger coach. It is conceded that he can make such transfers as long as he remains on the train, provided he gives notice to the conductor and gets his assent. But the assent of the defendant to such transfers is not necessary, because there is no condition in the contract which requires it. If the holder of the section, after having gone part of his journey, can transfer it to another for the rest of the trip, he himself continuing on the train but riding in a passenger coach, as I think he can do, he can make a valid transfer on leaving the train, because it makes no difference to the Pullman Company, which has nothing to do with his contract of transportation, whether he withdraws into a passenger coach or leaves the train.

"It is further contended that the condition on the ticket that it is good 'only when accompanied by a first-class railroad ticket,' and the limitation on the conductor's check that it is 'good for this trip only,' and the fact that the through rate from Washington to Chicago is less than the aggregate rate of a section from Washington to Deshler and then from Deshler to Chicago, imply a restriction against transfer after the holder has once started. I cannot accept this view. The condition on the ticket is simply a designation of the class of persons who alone are entitled to avail themselves of the con-

veniences of the sleeping car; it would prevent the transfer of a section to one who did not hold a first-class railroad ticket, but the condition rather implies that such cars are open to all who do have such tickets. 'This trip' means the trip stated on the face of the check upon which is found the restriction, that is, from Washington to Chicago. No attempt was made to use it on any other trip than the trip for which the check expressly states that it was good. Even if 'this trip' under the contract of carriage would from its nature be construed to mean a trip by the same person as well as on the same train, there is nothing, as I have endeavored to show, which would require these words to receive the same construction under the contract in question. To construe this condition as meaning 'good for this trip only *and good only in the hands of the holder who starts with it*,' would be nothing less than interpolating a material condition not in the contract.

"There is nothing in the fact of a reduced rate which implies non-transferability. It may well be that the company prefers by one transaction to sell a section for a long trip at a reduced rate rather than chance its sale at higher local rates to several successive purchasers between intermediate stations. It is settled that the usual return coupons of round-trip excursion tickets, which are always sold at reduced rates, are transferable: *Carsten's Case*, 44 Minn. 454; *Hoffman's Case*, 45 Minn. 53; *Sleeper's Case*, 100 Pa. 257; and where a through straight ticket over several roads is sold at a reduced rate, the passenger at the end of any one road may transfer any remaining coupons: *Nichols' Case*, 23 Oregon, 123. The condition on a railroad ticket that in consideration of a reduced rate it is not transferable is good, but non-transferability will not be implied from the mere fact of a reduced rate. If the reduced rate does not affect the right to transfer the railroad ticket, there is no reason why it should prevent the transfer of the Pullman ticket.

"It follows from what I have said that, in my judgment, the transfer of the section in question to Mr. Curlander was valid, and the ejection of his wife therefrom was wrongful. There being no restriction upon its transfer in the terms of the con-

tract, except as against such as are not first-class passengers, nor in the nature of the contract, or to be implied from any of its conditions, there certainly are no considerations of public policy or convenience which call on the court to so construe the voluntary contracts of this defendant as to enable it, contrary to the wishes of the first purchaser, to sell the same thing twice."

Assault by Employe after Passage has Ceased

According to a recent decision of the Supreme Court of Utah, when a passenger leaves the station to which he has come as a passenger, to engage in his own affairs, his relation as a passenger ceases, and the carrier is not liable for an assault on him, on the grounds of the company outside the station, committed afterwards by its section foreman, because of private ill-will, and not permitted by the company; but when, after being thus assaulted, the quondam passenger returned to the station, and was there again assaulted by the section foreman and others, in the presence of the station agent, to whose orders the foreman was subject, but who made no earnest effort to protect him, the company was liable for the last assault: *Krantz* v. *Rio Grande Western Ry. Co.*, 41 Pac. Rep. 717.

Constitutional Law, Invalid Ordinance

The Supreme Court of California has lately held, that an ordinance which makes it unlawful "for any person to have in his possession, unless it be shown that such possession is innocent, any lottery ticket, is unconstitutional, inasmuch as it places on the person accused of its violation the burden of showing the innocence of his possession (which would seem to be practically impossible): *In re Wong Hane*, 41 Pac. Rep. 693.

Criminal Law, Larceny, Animo Furandi, Function of Jury

Upon a trial for larceny the question whether the goods were taken *animo furandi* is a question of fact for the jury; and therefore it has been held lately by the Queen's Bench Division, that a conviction was wrong, on the ground that there had been no finding by the jury that the prisoner had acted *animo furandi* when, at the close of a case in the quarter sessions, the jury announced that they had not agreed

upon their verdict, but the chairman, having asked them if they believed the evidence for the prosecution, and having received an affirmative answer, directed a verdict of guilty to be entered: *Queen* v. *Farnborough*, [1895] 2 Q. B. 484.

Third Conviction, Life Sentence

The Supreme Court of Appeals of Virginia has recently decided a very interesting point of criminal law, to the effect that under the code of that state, §§ 3905, 3906, which provide for sentencing for a life a convict who has been previously twice sentenced to the penitentiary, no one can be so sentenced unless it appears that the previous offences for which he has been sentenced were penitentiary offences in themselves when committed, and not merely made so because of repeated convictions and sentences for offences which would otherwise be misdemeanors: *Stover* v. *Commonwealth*, 22 S. E. Rep. 874.

Statutes which subject a criminal convicted of a second or third offence to a severer punishment therefor, are not in violation of the constitutional provision that no one shall be twice put in jeopardy for the same offence. The increased punishment is not inflicted for the first offence, but because of the criminal's persistence in crime: *Peo.* v. *Martin*, 47 Cal. 113; *Kelly* v. *Peo.*, 115 Ill. 583; *Ross's Case*, 2 Pick. 165; *Sturtevant* v. *Commonwealth*, 158 Mass. 598; S. C., 33 N. E. Rep. 648; *Ingalls* v. *State*, 48 Wis. 647. For the same reason, they are not open to the objection that they are *ex post facto*, even when the prior convictions occurred before the passage of the act imposing the additional penalty: *Ex parte Gutierrez*, 45 Cal. 429; *Commonwealth* v. *Graves*, 155 Mass. 163; S. C., 29 N. E. Rep. 579; *Blackburn* v. *State*, 50 Ohio St. 428; S. C., 36 N. E. Rep. 18; *Rand* v. *Commonwealth*, 9 Gratt. (Va.) 738. Such statutes, however, cannot apply to the case of a conviction for an offence committed after that for which the prisoner is on trial, but for which he is first tried: *Rand* v. *Commonwealth*, 9 Gratt. (Va.) 738.

If it is intended to impose upon the criminal the additional punishment for repeated offences, the indictment must allege that the defendant had been previously convicted, sentenced, and imprisoned (once or twice, as the case may be,) in some

penal institution for felonies, (as such penalties are usually only prescribed for felonies or penitentiary offences,) describing each separately: *Tuttle* v. *Commonwealth*, 2 Gray, 505; *Commonwealth* v. *Harrington*, 130 Mass. 35; *Sturtevant* v. *Commonwealth*, 158 Mass. 598; S. C., 33 N. E. Rep. 648; *Commonwealth* v. *Walker*, (Mass.) 39 N. E. Rep. 1014; *State* v. *Austin*, 113 Mo. 538; *Blackburn* v. *State*, 50 Ohio St. 428; S. C., 36 N. E. Rep. 18.

As a general rule, the courts have no discretion in the matter of imposing sentence under the habitual criminal acts. If the indictment alleges and the jury finds the necessary facts, the court must impose the additional punishment: *Combs* v. *Commonwealth*, (Ky.) 20 S. W. Rep. 268; *Sturtevant v. Commonwealth*, 158 Mass. 598; S. C., 33 N. E. Rep. 648; *Blackburn* v. *State*, 50 Ohio St. 428; S. C., 36 N. E. Rep. 18. And if the indictment does so allege and the jury does so find, the additional punishment, if not included in the sentence, cannot be legally awarded against the convict on an information afterwards filed for that purpose: *Plumbly* v. *Commonwealth*, 2 Metc. 413. It is not necessary, unless required by statute, that the subsequent conviction or convictions should be for the same identical offence or character of offence. It is sufficient if the accused has been convicted of any one of the offences of the *grade* named: *Kelly* v. *Peo.*, 115 Ill. 583.

Elections, Ballots, Printing Names of Candidates

According to the Supreme Court of Michigan, an act which prohibits the printing on the official ballot of the name of a candidate, who receives the nomination of two or more parties, in more than one column, is a valid exercise of the power conferred on the legislature by the Constitution, (Art. 7, § 6), "to pass laws to preserve the purity of elections and guard against abuses of the elective franchise": *Todd* v. *Board of Election Comrs.*, 64 N. W. Rep. 496.

Marking Ballots

The question of the validity of irregularly marked ballots seems to be one that it is impossible to settle finally. In *Vallier* v. *Brakke*, 64 N. W. Rep. 180, the Supreme Court of South Dakota has recently decided a number of

questions with regard to the validity of ballots cast under the laws of that state. These are practically the same as have arisen in most of the other states, but of course depend for their decision upon the wording of the statute. The relevant part of this is as follows:

"The voter, after retiring to the booth as provided by section twenty-five of said chapter, may make a cross in a circle to be printed for that purpose at the head of each ticket, over the ticket he desires to vote, and if he desires to vote for any candidate on any other part of the ballot, he may erase the name of the candidate for that office on his ticket, and place a cross to the left of the name of such person for whom he desires to vote, and in case a voter does not wish to vote a party ticket, he need not cross the circle at the top, but may put a cross at the left of the name of any candidate for whom he wishes to vote": Laws S. Dak. 1893, c. 80, § 4.

"Tickets marked in a circle at the top with a cross showing the intention of the voter to designate such ticket as his vote, shall be counted throughout, except when a name is erased with a lead pencil or otherwise, and a cross to the left of any name on any other ticket shall be taken as a vote for such person: Provided the name of the candidate for the same office on the ticket marked at the top by the voter is erased, or it otherwise appears that no other person has been voted for the same office:" Laws S. Dak. 1893, c. 80, § 6.

These instructions, which seem sufficiently clear and explicit, are thus interpreted by the court:

"The elector may adopt either of four methods in designating the candidates for whom he desires to vote. *First:* He may make a cross in the circle at the head of a party ticket, and in this manner vote the entire party ticket. In such case that ticket is full and complete and constitutes his ticket. *Second:* He may make a cross in the circle at the head of the party ticket, and may erase on that party ticket the names of the candidates for whom he does not desire to vote, and not supply the place of the erased name or names. He then votes the party ticket, except as to the candidates whose names are erased, and as to these the ticket is not filled. *Third:* When the elector has

made a cross in the circle at the head of the party ticket, and erased the name of one or more candidates thereon, he may fill out his ticket in whole or in part by placing a cross to the left of the names of candidates on other tickets, thus making his ticket to consist of the names not erased upon his own party ticket and the places of those erased filled by the name or names of candidates on other tickets. *Fourth:* If the elector chooses, he may omit the cross in the circle at the head of any party ticket, and make up his ticket by placing a cross to the left of the names of such candidates as he desires to vote for upon any ticket on the ballot, the candidates so voted for representing different offices on the ticket." The opinion then states that as the statute has thus declared the effect of the marks, the courts cannot go beyond them in order to ascertain the voter's intention; nor give effect to that intention, if he has failed to substantially conform to the provisions of the law.

According to these principles, it was decided (1) That a cross at the head of the party ticket, but not within the circle, is a nullity; (2) That one or more circles within the circle at the head of a party ticket do not constitute a cross within the circle, and should be disregarded; (3) That a cross at the right of a candidate's name is not a mere informality in the form of marking, but is unauthorized and of no effect; (4) That a straight diagonal line at the left of the name of a candidate is not a cross, and cannot be considered; (5) That erasing a name on a party ticket marked with a cross in the circle at the head, and writing under it the name of the candidate for the same office on another ticket, is unauthorized, and the vote cannot be counted for the latter candidate; (to the same effect is *Parmley* v. *Healy*, [Supreme Court of South Dakota], 64 N. W. Rep. 186;) (6) But that when the intention of the elector to make a cross is clearly apparent, and the cross is made, whether with a stamp or otherwise, any mere informality in making it should be disregarded; (7) When a cross is made in the circle at the head of a party ticket, and no name is erased thereon, it is to be counted throughout for the party ticket, and no cross or mark opposite the name of any candi-

date on any other ticket can be resorted to to defeat the declared effect of the cross at the head of the ticket; (8) That since the law has made no provision for a cross in the circle at the head of more than one party ticket, crosses in the circles at the heads of two or more party tickets neutralize each other, and the ballot must in such case be treated as if no cross were made at the head of any party ticket; (9) That if the attempted erasure of a candidate's name on a party ticket, properly marked by a cross in the circle at the head thereof, is such that it can be clearly seen that the voter has made an effort to erase the name, and intended in fact to do so, any informality in the mode of erasure should be disregarded; and that an erasure can be made by blotting the name with a cross or crosses by use of the official stamp, as well as by drawing a line through it; (10) That when an elector does not make a cross in the circle at the head of any party ticket, he may indicate candidates for whom he desires to vote by placing a cross at the left of the candidate's name on any ticket, and need not erase any name on the ballot. It was also held that when the voter writes his own name on the ballot, that ballot is marked so that it can be identified, and is void.

In *Buckner* v. *Lynip*, 41 Pac. Rep. 762, the Supreme Court of Nevada has very sensibly ruled that, although the ballot law of that state (Act, Nev. 1891, c. 40) provides (§ 24) that "no ballot shall be deposited in the ballot box unless the watermark, as hereinbefore provided, appears thereon, and unless the slip containing the number of the ballot has been removed therefrom by the inspector, and (§ 26) that "any ballot upon which appears names, words, or marks written or printed, except as in this act provided, shall not be counted," yet it is proper to count ballots from which the inspector, through ignorance, failed to remove the slips bearing the number, in spite of the fact that his failure to do so made the voter's ballot capable of identification.

The same court has also held that a mark which appears to have been accidentally made, and not from an evil purpose, should not be construed as a distinguishing mark, so as to avoid the ballot. "Adopting this view, a ballot written by a

hand unaccustomed to the use of a pencil, or awkwardness in its use, or carelessness, or an apparent attempt to retrace a clumsily made cross X, or an effort to make it more certain, and in doing so employing more lines than are necessary to properly make a cross, or a slightly blurred spot to correct a mistake, not indicating an intention to identify the ballot, or a slight erasure for the same purpose, or across made when the ballot paper was defective, and to avoid the defect, and make the vote more certain, a second cross was made, or a slight pencil mark, clearly made by accident, and not design, or a stain of tobacco, will not avoid the ballot. . . . . But blurred spots, plainly made by a lead pencil, which may have been made for the purpose of cancelling a cross, but which might have been made also for identification, or a cross not opposite the name of any candidate, or two or more crosses instead of one, or a number of crosses in a bunch, or a mark not a cross, or the use of a blue lead pencil instead of a black one, [as required by the act,] or a straight line, thus ——, over the word "No," or writing a word instead of employing a cross, are grounds for rejecting the ballot:" *Dennis* v. *Caughlin*, 41 Pac. Rep. 768.

Voters, Students

In *In re Garvey*, 41 N. E. Rep. 439, the Court of Appeals of New York has re-asserted the principle laid down by it in *In re Goodman*, 146 N. Y. 484; S. C., 40 N. E. Rep. 769, that, under the Constitution of that state, Art. 2, § 3, which provides that "For the purpose of voting no person shall be deemed to have gained or lost a residence, by reason of his presence or absence . . . . while a student of any seminary of learning," the intention to change the legal residence must be shown by acts independent of a person's presence as a student, in order to entitle him to vote in the new locality; and applying this rule to the facts of the particular cases before it, decided (1) That evidence that a student coming to attend a seminary as a student notified the registrar of the place of his former residence to strike his name from the voting list, as he had changed his legal residence, and also notified the authorities of the seminary that he had become a resident of the town in which it was situate, his

object in so doing being to render himself eligible as a postulant, showed an intent to change his legal residence by acts independent of his presence as a student; (2) That evidence that a person went to a seminary as a student; that he engaged in the business of book-selling, and was also lay reader in a church; that he was not obliged and did not intend, to leave the seminary after his course of study should be ended, did not establish a legal residence in the town where the seminary is situated; and (3) That evidence that a person went to a seminary as a student, and also as a teacher, and intended to establish his residence at the seminary after his course of study should be ended, was not sufficient to show a legal residence in the seminary town.

Electric Wires, Negligence, Actus Dei

In *Mitchell* v. *Charleston Light & Power Co.*, 22 S. E. Rep. 767, the Supreme Court of South Carolina has enunciated some very interesting principles in regard to the liability of an electric company for damages due to the breaking and falling of its wires, holding (1) That an instruction that if a cyclone that could not be anticipated was the cause of the falling of an electric wire, and, if the defendant was not negligent in allowing it to remain down for an unreasonable time, it would not be liable, is not to be considered as misleading, on the ground that it allows an inference that, if a cyclone which might have been anticipated was the cause, defendant was liable, though not negligent in allowing it to remain down an unreasonable time, when the court has also charged that, if it was the act of God, it could not be anticipated, and defendant would not be liable, but that, on the other hand, defendant was charged with the duty of placing the wires so as to withstand ordinary weather, and was liable if the accident was due to the fact that the wires were improperly erected, or had been allowed to remain on the ground an unusually long time after they were broken down; (2) That such an instruction is not open to the construction that defendant would be liable, though not negligent, if the falling of the wire was caused by a class of storm other than a cyclone, or by a storm of not quite the

same degree of violence as a cyclone, when the word "cyclone" was used because the witnesses had testified that the day was "cyclonic;" (3) That it is proper for the court to refuse an instruction that, if the wire was broken by some cause beyond the control of defendant, no blame could attach to the defendant from the fact that it fell and remained lying in the street, unless it was allowed to remain there "after notice" for an unreasonable time; for the negligence of defendant might have consisted in its failure to know the facts connected with the breaking of the wire, it being bound to use diligence to receive information as to the condition of its wires.

International Law, "Penal" Statutes, Enforcement in Foreign Countries

The Supreme Court of Texas has recently decided a very interesting point of international law, holding, in *Mexican Natl. R. R. Co.* v. *Jackson*, 32 S. W. Rep. 230, that as the laws of Mexico, while making negligence resulting in injury to another a penal offence, also give the injured person a right of action, civil in its nature, the courts of Texas, by enforcing a right of action for personal injuries caused by negligence which accrued in Mexico, do not undertake to enforce a penal law of a foreign country, and therefore do not contravene that principle of international law which forbids the enforcement of such laws by countries other than that of their enactment.

There are probably few rules of law less understood and of more uncertain operation than this one. A general confusion of the technical sense of the word "penal" with its inexact popular usage seems to be almost universal. Within the last few years, the two highest judicial tribunals of the world, the Supreme Court of the United States and the Judicial Committee of the Privy Council, have united in condemning this erroneous habit, and have attempted to clearly define the limits of the rule. In *Huntington* v. *Attrill* [1893] App. Cas. 150, the latter court, reversing the decision of the Ontario Appeal Court, 18 Ont. App. 136, which affirmed the decree of the court below, 17 Ont. Rep. 245, held that an action to recover a debt due by a corporation from a director thereof, under a

statute (Laws N. Y. 1875, c. 611, § 21,) providing that "If any certificate or report made, or public notice given, by the officers of any such corporation, shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof," while "penal" in the loose popular sense of the word, was not so in its international sense, and could be maintained in a foreign jurisdiction. The true doctrine is thus explained by Lord Watson: "The rule has its foundation in the well-recognized principle that crimes, including in that term all breaches of public law punishable by pecuniary mulct or otherwise, at the instance of the State Government, or of some one representing the public, are local in this sense, that they are cognizable and punishable in the country where they were committed. Accordingly no proceeding, even in the shape of a civil suit, which has for its object the enforcement by the state, whether directly or indirectly, of punishment imposed for such breaches by the *lex fori*, ought to be admitted in the courts of any other country. . . . The phrase 'penal actions,' which is so frequently used to designate that class of actions which, by the law of nations, are exclusively assigned to their domestic forum, does not afford an accurate definition. In its ordinary acceptation, the word 'penal' may embrace penalties for infractions of the general law which do not constitute offences against the state; it may for many legal purposes be applied with perfect propriety to penalties created by contract; and it therefore, when taken by itself, fails to mark that distinction between civil rights and criminal wrongs which is the very essence of the international rule. . . . The expressions 'penal' and 'penalty,' when employed without any qualification, express or implied, are calculated to mislead, because they are capable of being construed so as to extend the rule to all proceedings for the recovery of penalties, whether exigible by the statute in the interest of the community, or by private persons in their own interest. . . . A proceeding, in order to come within the scope of the rule, must be in the nature of a suit in favor of the state whose law has been

infringed. All the provisions of municipal statutes for the regulation of trade and trading companies are presumably enacted in the interest and for the benefit of the community at large; and persons who violate these provisions are, in a certain sense, offenders against the state law, as well as against individuals who may be injured by their misconduct. But foreign tribunals do not regard these violations of statute law as offences against the state, unless their vindication rests with the state itself, or with the community which it represents. Penalties may be attached to them, but that circumstance will not bring them within the rule, except in cases where these penalties are recoverable at the instance of the state, or of an official duly authorized to prosecute in its behalf, or of a member of the public in the character of a common informer. An action by the latter is regarded as an *actio popularis*, pursued, not in his individual interest, but in the interest of the whole community."

This decision was followed, and its reasoning adopted, by the Supreme Court of the United States, in *Huntington* v. *Attrill*, 146 U. S. 657, reversing 70 Md. 191, and overruling *First Natl. Bank* v. *Price*, 33 Md. 487; *Halsey* v. *McLean*, 12 Allen, 438; *Derrickson* v. *Smith*, 27 N. J. L. 166; and it may now be considered to be the settled rule in such cases, that no action will be regarded as penal in such a sense as to forbid its maintenance in a foreign jurisdiction, unless it rests upon an offence against the majesty of the state, and not merely against the rights of a private individual; and that even if the two exist side by side, the latter will be enforceable in a foreign court, though the former will not.

Lotteries, Coupon Competition

In a recent case in the Queen's Bench Division, *Stoddart* v. *Sagar*, [1895] 2 Q. B. 474, it was decided that the holding of a coupon competition in a newspaper, which was to be carried out by means of coupons, to be filled up by the purchasers of the paper with the names of the horses selected by the purchasers as likely to come in first, second, third and fourth in a race, the purchaser to receive a penny for every coupon filled up after the first, and a prize of

£100 being promised to any one who would name the first four horses correctly, would not make the promoters of the scheme liable either for opening and keeping an office to exercise a lottery, for selling tickets and chances in a lottery, or for publishing a proposal or scheme for the sale of tickets and chances in a lottery, because the facts stated did not amount to a lottery; nor for opening, keeping and using an office for the purpose of money being received as the consideration for an undertaking to pay money on events and contingencies relating to horse-races, or for receiving moneys as deposits on bets, or for publishing an advertisement inviting all who read it to make bets and wagers on such events and contingencies.

The first distinctive feature of a lottery is, that it consists in a distribution of prizes by lot or chance, without giving those who participate in it an opportunity to win by the exercise of skill or judgment. If this factor is present, it does not matter whether or not the prize to be won is disproportionate to the price paid for joining in the scheme, whether any price is paid or not, or whether there are blanks or not.

As an instance of a lottery scheme pure and simple, the case of *Davenport* v. *City of Ottawa*, 54 Kans. 711; S. C., 39 Pac. Rep. 708, will serve. The defendant in that case was a partner in a firm which operated a large dry-goods store. The firm placed in its window a locked box, with a glass front, containing twenty-five dollars in bills, and advertised that all persons buying goods in their store, and paying for the same fifty cents or over, would be given a key; that one and only one key which would unlock the box would be given out; and that the person who received the key which would unlock the box would be given the twenty-five dollars from it. The defendant sold goods at the usual and ordinary prices, without extra charge for the key, to various persons, for fifty cents and over, and gave to each of the said persons a key, to which was attached a card stating in substance the above offer. These transactions were held to be in effect sales of merchandise and lottery tickets for an aggregate price. Very similar to this was the case of *The State* v. *Mumford*, 73 Mo. 647, where the

proprietors of a newspaper issued to each subscriber to their paper, in addition to the paper itself, and without extra charge, a ticket which entitled the holder to participate in a distribution of prizes offered by the proprietors to all persons who should become subscribers, which distribution was to be made by lot. This, too, was held to be a lottery.

Another instance of a lottery device, in this case consisting of chances secured by payment of a price therefor, is found in the proceedings of the various bond investment companies, which have but recently been broken up by the postal authorities. The method adopted was to issue bonds at a specified price, and to make the value of each bond dependent upon its number, the bonds being numbered in the order in which applications therefor reached the secretary of the company. This system of valuation was held to be so far dependent on chance as to constitute a lottery: *MacDonald* v. *United States*, 63 Fed. Rep. 426.

Even if all those who participate in the scheme draw a prize of some sort, if the drawing is a matter of pure chance, the device is a lottery, and the value of the prize, as compared with the money paid, is immaterial. In *Taylor* v. *Smetten*, 11 Q. B. D. 207, the appellant sold packets of tea, each containing a coupon, entitling the purchaser to a prize. This was publicly stated by the appellant before the sale, but the purchasers did not know till after the sale what prize they were entitled to receive. The prizes varied in character and value, but the tea was good, and worth the money paid for it. In spite of these facts, the transaction was held a lottery.

If, however, the scheme affords room for the exercise of individual skill and judgment, so that the result does not depend merely on chance, it is not a lottery. This would seem to have been the ground of the decision in *Stoddart* v. *Sagar*, *supra*, and in *Caminada* v. *Hutton*, 60 L. J. M. C. 116, which was very much like *Stoddart* v. *Sagar* in its facts. But it is not so easy to reconcile with these cases that of *Barclay* v. *Pearson*, [1893] 2 Ch. 154, the case of the "Missing Word Competition." In that case the defendant, who was the proprietor of a newspaper, carried on in connection there-

with a competition under the following conditions. He published in his paper a paragraph omitting the last word. In the same paper he printed a coupon with a direction that persons wishing to enter the competition must cut out the coupon, fill in the word missing from the paragraph, together with their names and addresses, and send it, with a postal order for one shilling, to the office of the paper. It was further stated in the paper that the missing word was in the hands of a chartered accountant, enclosed in a sealed envelope; that his statement with regard to it would appear, together with the result of the competition, in a subsequent issue of the paper; and that the whole of the money received in entrance fees would be divided equally among those competitors who filled in the missing word correctly. This would seem to have afforded a large field for the judgment of the competitors; and yet it was held by STIRLING, J., to be a lottery, so far at least as to prevent the successful competitors from recovering the prize moneys from the defendant. The judge put his decision upon the ground that the selection of the word to be supplied rested on the arbitrary choice of the defendant, and was therefore a matter of chance. But, granting the fact, it does not follow that the inference is correct; for the "chance" which makes a scheme a lottery is not chance in the selection of the criterion of distribution, but chance in the distribution itself. If the criterion is unknown, then the distribution is a matter of pure chance, and the scheme is a lottery; but, if the criterion is known, and it lies in the power of each competitor to shape his competitive efforts with regard to that criterion, his individual judgment comes into play, and the device is not a lottery. These criticisms, however, do not apply to the decision in the particular case, but to the reasons given therefor, which seem to have been too broadly stated. The true basis for holding that competition a lottery is, that the missing word was selected in such a manner that any one of a hundred different words might fill the gap equally well with that selected, and there could therefore be no judgment exercised, but only mere guesswork.

Another essential element of a lottery device is, that the participator should part with something of value in order to obtain a right to participate in the distribution; and if this is not the case, the scheme is not a lottery. Thus, in *Cross* v. *Peo.*, 18 Colo. 321, the defendants published the following advertisement:

"Given Away—D. K. Cross & Co., give away pianos to advertise their shoe store, 1552 Larimer street, Denver, Colorado. Every customer receives our numbered business cards, or one will be sent to any address on receipt of stamp for postage, or given to each adult person registering their name at our shoe store."

It was understood that the pianos were to be allotted by some method of chance; but the court held that it was not a lottery, on the ground that no valuable consideration was required of the participators, as was clearly shown by the advertisement.

Malicious Prosecution, Nolle Pros.

A *nolle prosequi* entered in a criminal prosecution constitutes a sufficient termination of the prosecution to authorize the defendant to maintain an action for malicious prosecution, unless the record shows that the *nolle prosequi* was entered at his instance: *Marcus* v. *Bernstein*, (Supreme Court of North Carolina,) 23 S. E. Rep. 38, 1895.

Peddlers, License, Interstate Commerce

The Supreme Court of Indiana has recently ruled, in *City of South Bend* v. *Martin*, 41 N. E. Rep. 315, in accordance with the consensus of authority, that one who goes from house to house with articles of commerce, offering them for sale, and delivering them as sold, is engaged in peddling; and that an ordinance prohibiting peddling without a license is not an interference with interstate commerce, when it is sought to apply it to a person who takes about with him chairs sent to him to sell as agent, by a manufacturer in another state, and delivers them at the time the sales are made; and that it is immaterial that the sales are made on the instalment plan, and that the title remains in the manufacturer until the full price is paid.

One who goes from house to house with rugs, leaving them at a stipulated weekly payment, the title to pass to the party renting the rug when the whole amount of the rental is paid, is a peddler, within an ordinance requiring peddlers to have a license: *Peo.* v. *Sawyer*, (Supreme Court of Michigan), 64 N. W. Rep. 333.

There is a brief note on the general question of the elements required to make one a peddler, in 2 AM. L. REG. & REV. (N. S.) 569.

Statutes, Amendment

According to a recent decision of the Supreme Court of Nebraska, the amendment of a statute does not repeal it so that a subsequent statute, which professes to amend the original act, is invalid: *State* v. *Bemis*, 64 N. W. Rep. 348.

There is a full annotation on this subject in 1 AM. L. REG. & REV. (N. S.) 566.

Trade Marks, Designs, Infringement

Judge KEKEWICH, of the Chancery Division, has lately held that registration of a design, under the English statutes, does not protect the idea of the designer, but only the actual design; and that therefore, when the plaintiff had registered a design consisting of a church window of a particular style of architecture, with tracery above and below, which they applied in metal work to the sides of upright hexagonal oil stoves, and the defendants adopting the plaintiff's idea, produced a design consisting of a church window of a different style of architecture, with different tracery above and below, which they also applied in metal work to the sides of hexagonal oil stoves, the latter design could not be considered an infringement of the former, as the two designs were essentially different: *Harper* v. *Wright & Butler Lamp Mfg. Co., Ltd.*, [1895] 2 Ch. 593.